Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

LOCAL UNION 1393, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner,

v.

UTILITIES DISTRICT OF WESTERN INDIANA RURAL ELECTRIC MEMBERSHIP COOPERATIVE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a discharge grievance is subject to arbitration under a collective bargaining agreement that contains a "cause" limitation on the employer's right to terminate seniority but no similar language with respect to the employer's right to terminate employment.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings in the United States Court of Appeals for the Seventh Circuit, with the exception of amici curiae, appear in the caption to this Petition.

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v.

UTILITIES DISTRICT OF WESTERN INDIANA RURAL ELECTRIC MEMBERSHIP COOPERATIVE,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

Local Union No. 1393, International Brotherhood of Electrical Workers, AFL-CIO, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on February 12, 1999 in this case.

CITATIONS TO OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is officially reported at 167 F.3d 1181 (7th Cir. 1999) and appears in the Appendix of

this petition at pages App. 1a-8a.[1] The decision of the United States District Court for the Southern District of Indiana is not published in either an official or unofficial reporter. It appears in the Appendix of this petition at pages App. 9a-19a.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 203(d) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 173(b).

Section 301(a) of the LMRA, 29 U.S.C. § 185(a).

Pursuant to Supreme Court Rule 14(f) the text of these statutes are set forth, *infra,* at App. 22a.

STATEMENT OF THE CASE

A. The Facts and The Jurisdiction of the District Court.

The jurisdiction of the District Court was invoked under 28 U.S.C. § 1331 (general federal question jurisdiction) and 29 U.S.C. § 185(a) (jurisdiction over disputes arising under collective bargaining agreements). In the District Court, Petitioner Local Union No. 1393, International Brotherhood of Electrical Workers, AFL-CIO ("Local 1393") filed a complaint against the Respondent, Utilities District of Western Indiana Rural Electric Membership Cooperation ("UDWI"), to compel arbitration under a collective bargaining agreement of a grievance

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[1] References to the Appendix to this petition will be as follows: "App. ——."

protesting UDWI's discharge of a bargaining unit employee named Dennis Bays ("Bays"). (App. 9a.)

Local 1393 and UDWI are parties to a collective bargaining agreement ("CBA") effective July 1, 1997, governing the terms and conditions of employment of UDWI's production, maintenance and construction employees. (App. 10a.)

Article III, Section 1 of the CBA broadly defines a grievance as "[a]ny difference arising between an employee or a group of employees as to [UDWI's] interpretation or application of this Agreement or any of its terms and conditions. . . ." (App. 10a.) The CBA contains grievance/arbitration procedures that culminate in arbitration. The arbitration clause in the CBA precludes arbitration of "questions of management and matters retained by the employer as provided in [Section] 5 of Article II", but permits arbitration "as to any other questions." (App. 11a.)

Article II, Section 5 of the CBA, referenced in the arbitration clause, is the management rights clause. It states, in relevant part:

> Subject only to any limitations contained in this Agreement, the Union recognizes and agrees that the Employer retains the exclusive rights to . . . discharge . . . and discipline its employees. . . .

(App. 11a.) Also of relevance is Article V, Section 4 of the CBA, the seniority clause, which provides:

> Seniority shall be considered broken and seniority shall not be restored to a regular employee who . . . is discharged for cause. . . .

(App. 12a.)

B. Proceedings Below.

On or about January 28, 1998, the parties filed respective motions for summary judgment. Local 1393 argued that Article V, Section 4 of the CBA, which expressly limits the right of UDWI to terminate the seniority of an employee to situations where the employee is discharged "for cause", by implication places a limitation on UDWI's right to discharge. Consequently, the grievance over Bays' discharge should be subject to arbitration.

On or about May 19, 1998, the District Court denied Local 1393's motion for summary judgment and granted UDWI's motion for summary judgment. The District Court found controlling the language contained in the management rights clause that "the Employer retains the exclusive rights to . . . discharge . . . and discipline." The District Court maintained that the "arbitration and grievance procedure specifically exempted [the right to discharge] from having to be subject to arbitration." (App. 17a.) Furthermore, the District Court found that the seniority provision of Article V could not be read as limiting the employer's right to discharge under the management rights clause. According to the District Court,

> The right to discharge and the right to end an employee's seniority are two different rights. Seniority refers to the continuous service of an employee and is a factor the employer takes into account when making employment decisions. . . . [S]eniority is not coterminous with employment.

(App. 16a.)

On May 28, 1998 Local 1393 filed its Notice of Appeal to the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit"). On February 12, 1999, the Seventh Circuit affirmed the decision of the District Court. (App. 1a-2a.)

The Seventh Circuit acknowledged that this Court's jurisprudence on labor arbitration requires that arbitration be compelled whenever an arbitration clause is merely "susceptible of an interpretation that covers the asserted dispute" and that federal courts resolve any doubts as to arbitrability in favor of coverage. *A T & T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643 (1986), and *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). (App. 4a). The Seventh Circuit further noted, quoting from its decision in *International Bhd. of Teamsters Local 371 v. Logistics Support Group*, 999 F.2d 227, 230 (7th Cir. 1993), that "the management rights clause may not be considered apart from the rest of the agreement." (App. 5a.) Nonetheless, the Seventh Circuit affirmed the District Court's refusal to compel arbitration.

In affirming the District Court, the Seventh Circuit held that the seniority rights clause could be considered neither an express nor an implied limitation on UDWI's right to discharge its employees. The Seventh Circuit found that "[a] termination of employment does not necessarily also terminate seniority and therefore violate the seniority rights clause of the CBA", and that "[t]he right to seniority and the right to continued employment are distinct concepts". (App. 6a.) The Seventh Circuit further concluded that, although the presence of an arbitration clause and a "cause" requirement for the removal and termination of seniority each implies a "just cause" limitation on the right to discharge, no such implication could be found in the present case because the terms of the management rights clause "so clearly state that the Utilities District possesses plenary authority over discharge decisions." (App. 6a.) Consequently, the Seventh Circuit concluded that the CBA was not at least susceptible of an interpretation covering the dispute over Bays' dis-

charge and affirmed the District Court's judgment denying arbitration. (App. 7a.)

On February 23, 1999, Local 1393 submitted to the Seventh Circuit a petition for rehearing and suggestion for rehearing *en banc*. On March 10, 1999, the Seventh Circuit denied the petition for rehearing. (App. 20a-21a.)

REASONS FOR GRANTING THE WRIT

The Seventh Circuit's decision in this case is in direct conflict with decisions rendered by the Eighth and Ninth Circuits, creating a split in the Circuits concerning the proper construction and interpretation of collective bargaining agreements which contain a "cause" limitation on the employer's right to terminate seniority but no similar language with respect to the employer's right to terminate employment. This split in the Circuits can only be resolved by this Court because it involves the heretofore strong federal policy favoring arbitration of labor disputes over the resort to legal or economic warfare.

Indeed, the Seventh Circuit's decision is contrary to the decisions of this Court not only favoring arbitration, but also creating a presumption of arbitrability when interpreting collective bargaining agreements that contain arbitration clauses. The decision of the Seventh Circuit so far departs from the accepted and usual application of federal labor policy as to invoke the supervisory powers of this Court. Therefore, this case provides this Court with the opportunity to prevent substantial damage to the national labor policy of submitting disputes to arbitration.

I. THIS COURT SHOULD GRANT THE WRIT TO RESOLVE A SPLIT IN THE CIRCUITS THAT THREATENS THE ORDERLY ADMINISTRATION OF JUSTICE IN VIRTUALLY ALL CASES INVOLVING COLLECTIVE BARGAINING AGREEMENTS WHICH RESTRICT AN EMPLOYER'S RIGHT TO TERMINATE SENIORITY BUT ARE SILENT ON THE EMPLOYER'S RIGHT TO DISCHARGE.

In finding that the language of the management rights clause of the CBA was not restricted in any way by the seniority provision of Article V, the Seventh Circuit quoted with approval the observation of the District Court that

> [t]he right to discharge and the right to end an employee's seniority are two different rights. Seniority refers to the continuous service of an employee and is a factor the employer takes into account when making employment decisions. . . . [S]eniority is not coterminous with employment.

(App.. 3a-4a.) Relying on the District Court's analysis, the Seventh Circuit went on to conclude as follows:

> We do not believe that the seniority rights clause can be considered an express limitation on the right of the employer to terminate employees. A termination of employment does not necessarily also terminate seniority and therefore violate the seniority rights clause of the CBA. The right to seniority and the right to continued employment are distinct concepts that the parties to a CBA may choose to treat separately.

(App. 6a.)

Neither the District Court nor the Seventh Circuit cited case law to support these holdings because no such foun-

dation is available. Rather, the opinion of the Seventh Circuit goes against a well-established body of legal authority and a vast body of arbitral authority holding that the termination of seniority is the concomitant of the termination of employment. If an employee has seniority rights, but no job, he has nothing; the distinction drawn by the Seventh Circuit between loss of employment and loss of seniority is one without substance or meaning.

If left to stand, the determination of the Seventh Circuit would leave a split in the Circuits concerning the proper interpretation of collective bargaining agreements that contain a "cause" limitation on the employer's right to terminate seniority but contain no such language with respect to termination of employment.

In *SFIC Properties v. International Assn. of Machinists & Aerospace Workers, Dist. Lodge 94*, 103 F.3d 923 (9th Cir. 1996), *cert. denied*, 118 S. Ct. 80 (1997), the Ninth Circuit reversed the District Court's vacating of an arbitrator's award involving a collective bargaining agreement with a seniority provision similar to the seniority provision in the instant case. In *SFIC Properties*, the Ninth Circuit approved of the arbitrator's inferring a just cause requirement for discharge from two different sources in interpeting the CBA at issue:

> First [the arbitrator] noted that "sufficient or just cause requirements will be inferred in all modern day collective bargaining agreements which do not contain an express 'just cause' standard for discharge provision." Second, he concluded that the CBA's seniority section, which stipulates that in the event of "dismissal for cause" an employee loses his seniority, implied a just cause requirement.

103 F.3d at 925.

The Ninth Circuit noted that "it is very common . . . to infer just cause requirements from CBA's which are silent on the issue . . . ." 103 F.3d at 926. In essence, the Ninth Circuit acknowledged the principle, recognized explicitly and implicitly in an overwhelming number of published arbitration decisions [2], that a limitation on an employer's right to terminate an employee's seniority is tantamount to a limitation on its right to discharge. Contrary to the Seventh Circuit's view, employment termination and the loss of seniority are ordinarily coterminous in labor relations law. Indeed, as the Ninth Circuit observed, it is "difficult to imagine a meeting of the minds between an employer and a union authorizing an employer to discharge an employee without good cause." *Id., citing Dickeson v. Daw Forest Products,* 827 F.2d 627 (9th Cir. 1987).

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[2] *See, e.g., State of Montana,* 107 Lab. Arb. (BNA) 1060 (Calhoun 1997) ("Seniority is a creature of the contract. The grievant cannot be terminated from his employmnt and retain his seniority. An employee maintains his seniority rights because of his status as an employee under the contract."); *Multi-Clean, Inc.,* 102 Lab. Arb. BNA 463, 466 (Miller, 1993) (loss of seniority provision limits employer's discretion to discharge); *Bowater Carolina Co.,* 92 Lab. Arb. (BNA) 162, 167 (Clarke, 1989) (loss of seniority for cause provision "[b]y clear implication . . . limits the Company's right to discharge employes to situations wherein such actions are for cause."); *Westinghouse Materials Co.,* 89 Lab. Arb. (BNA) 1150 (Traynor, 1987) (for cause loss of seniority provision, standing alone, presumed to limit employer's discretion to discharge); *Boyle-Midway, Inc.,* 70 Lab. Arb. (BNA) 963, 966 (Traynor, 1978) ("the termination of seniority rights was the same thing as terminating an employee's right to employment"); *Bassick Co.,* 38 Lab. Arb. (BNA) 278 (Seitz, 1962) (termination of employee's seniority is same thing as termination of employment relationship), and *Higgins, Inc.,* 24 Lab. Arb. (BNA) 453, 455 (Morvant, 1955) (a clause stating that seniority is lost where employee is discharged for cause "unquestioningly restrict[s] or limit[s] management's rght to discharge for cause.")

In *Excel Corp. v. United Food and Commercial Workers International Union, Local 431*, 102 F.3d 1464 (8th Cir. 1996), the Eighth Circuit upheld the lower court's granting of the employer's motion for summary judgment in an action brought to vacate an arbitrator award. In *Excel*, the Eighth Circuit found that the arbitrator's ignored the plain language of the CBA at issue and instead relied upon parol evidence in rendering his award. Consequently, the Eighth Circuit found that the arbitrator's award did not "draw its essence from the agreement" and upheld the District Court's order vacating the award.

The CBA in *Excel* contained a management rights provision under which the employer retained

> the right to hire, suspend, discipline or discharge for cause, to assign jobs to determine qualifications and the ability of employees, to transfer, promote or demote employees, [and] to increase and decrease the working force . . . .

102 F.3d at 1469. The CBA also contained a seniority provision which stated that "[a]n employee shall lose his seniority for several enumerated reasons, including "discharge for proper cause" and "[a]bsent from work for any reason for [a] period of twelve (12) months." *Id.*, at 1466. Last, the CBA contained the following "anti-discrimination" clause:

> The Company and the Union agree that they will not discriminate against any employee or applicant for employment because of race, sex, color, creed, nationality, age, religion, veteran status, handicaps, or national origin.

Id., at 1467.

The employer in *Excel* discharged approximately fifty (50) employees who had sustained on-the-job injuries and took medical leaves of absence. The union filed griev-

ances alleging that the seniority provision was not intended by the parties to be used to terminate employees who were laid off due to work-related injuries. The arbitrator ruled in the union's favor, relying on parol evidence to establish that, in light of the anti-discrimination provision, employees injured on the job should be excluded from the scope of the seniority provision.

The Eighth Circuit noted that the arbitrator properly resolved "[t]he only ambiguity . . . in the language of the seniority provision . . . i.e., that 'loss of seniority' means termination." 102 F.3d at 1470. Thus, according to the Eighth Circuit,

> [N]o ambiguity exists as to the interplay between [the] language [contained in the management rights provision] and the seniority provision, which was interpreted by the arbitrator to include discharging employees.

Id., at 1470. The Eighth Circuit found fault with the arbitrator's analysis, however, because the arbitrator went beyond the clear language of the CBA to consider parol evidence on the question of whether the seniority provision conflicted with the anti-discrimination provision, thereby "creat[ing] an ambiguity where none existed". *Id.*, at 1469.

It is crucial to note that, in affirming the District Court's order vacating the arbitrator's award, the Eighth Circuit objected only to the arbitrator's straying beyond the clear and unambiguous language of the CBA. 102 F.3d at 1468. The Eighth Circuit found no need to disturb the basic finding of the arbitrator, that "the 'loss of seniority' language included termination of employment[,]" *Id.*, at 1468 n.4, because in making that finding the arbitrator was clearly construing and applying the language of the CBA.

In contrast to the approach of the Eighth and Ninth Circuits, an approach wholly consistent with national labor policy, the Seventh Circuit in the present case has rendered an ultra-literal opinion that, if adopted on a wider scale, would upset the settled expectations of parties to hundreds and thousands of labor agreements. The split in the Circuits regarding this issue is particularly troublesome because federal law mandates uniform interpretation of CBAs throughout the nation. As this Court has repeatedly noted, the body of law regarding the interpretation of CBAs " 'is peculiarly one that calls for uniform law.' " *Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962), *quoting Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569 (1919).

Local 1393 respectfully submits that the split in the circuits created by the Seventh Circuit's decision in this case poses a threat to the orderly administration of justice and calls out for resolution by this Court.

II. THE SEVENTH CIRCUIT'S OPINION IS CONTRARY TO THIS COURT'S PRECEDENT.

There is a "well recognized policy of federal labor law favoring arbitration of labor disputes" which was established by this Court in the Steelworkers Trilogy. *See United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navigator Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960). Indeed, this policy favoring the resolution of disputes through grievance/arbitration procedures is set out explicitly in 29 U.S.C. § 173(d), which states, in pertinent part:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for set-

> tlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

The rule applicable to disputes arising under a collective bargaining agreement covered by 29 U.S.C. § 185(a) is that where such a CBA contains an arbitration clause,

> a presumption of arbitrability [is created] in the sense that "[a]n order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

AT & T Technologies, 475 U.S. 643, 650 (1986), *quoting Warrior & Gulf*, 363 U.S. at 582-83.

The presumption of arbitrability resulting from the presence of an arbitration clause is particularly compelling where the dispute is over the fairness of an employee's discharge. This presumption of arbitrability of a labor dispute arising under a labor agreement, reaffirmed in *Wright v. Universal Maritime Service*, 119 S. Ct. 391 (1998), is based on the premise that "arbitrators are in a better position than courts *to interpret the terms of a CBA*". 119 S. Ct. at 395. This Court has time and again expressed the policy that courts are not to delve into the substantive provisions of labor agreements except to determine wheher the union is making a claim that on its face is governed by the labor agreement. *American Manufacturing*, 363 U.S. at 563.[3]

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[3] In *Raceway Park v. SEIU Local 47*, 167 F.3d 953, 959 (6th Cir. 1999), the Sixth Circuit set out in stark detail how the national labor policy has benefitted from a reliance upon contractual grievance/arbitration mechanisms. The statistics cited by the Sixth

The presumption of arbitrability may be overcome only by "forceful evidence" of an intent to exclude a particular claim. *See, e.g., International Union of Operating Engineers Local 103 v. Indiana Construction, Inc.*, 910 F.2d 450, 452 (7th Cir. 1990). This presumption is derived from and supported by the general preference for arbitration which "furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining." *AT & T*, 475 U.S. at 65, *quoting Schneider Moving & Storage Co. v. Robbins*, 468 U.S. 364, 371-72 (1984).

In general, a grievance and arbitration procedure is regarded as a union's compensation for agreeing not to strike

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Circuit demonstrate that the Seventh Circuit's opinion in this case is very much in the minority:

> The twin products of the Supreme Court's decisions in *American Manufacturing* and *Warrior & Gulf*—a virtually irrebuttable presumption of arbitrability and a sharply limited role for the courts—has had a salutary effect upon grievance arbitration. In a 1990 study of all reported federal district court cases from 1960 until the end of 1988 pertaining to litigation brought to compel grievance arbitration, only 143 district court decisions involved pre-arbitration judicial intervention. Of the 136 decisions which actually resolved the arbitrability question, 103 (76%) resulted in a judicial order compelling arbitration. Over the course of 28 years, only 33 district court decisions declined to direct grievance arbitration. *See* Charles B. Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 Chi. Kent L. Rev. 571, 581 (1990) (citing Peter Feuille & Michale LeRoy, *Grievance Arbitration Appeals in the Federal Courts: Facts and Figures*, 45 Arb. J. 35, 39 (Mar. 1990)). "When one recognizes that thousands of contractual disputes were taken to arbitration during those twenty-eight years, it becomes apparent that the Supreme Court approach has encouraged parties to conclude their bargaining process with respect to contract disputes in the arbitral forum, instead of through resort to judicial intervention." *Id.* at 581-82.

during the period the labor agreemnt is in effect. Because the CBA in this case contains both a broad no-strike clause and a broad grievance-arbitration provision, reciprocity demands that few exceptions be read into the grievance provisions, and then only if such exceptions are express and stated with specificity. *American Manufacturing*, 363 U.S. at 567.

In the present case, the Seventh Circuit agreed with the District Court that the grievance clause contained in the CBA is "very broad." (App. 5a.) A grievance is defined as "[a]ny difference arising beween an employee or a group of employees as to [UDWI's] interpretation or application of [the CBA] or any of its terms and conditions . . . .." (App. 2a.) The presence of such a broad grievance clause further strengthens the presumption of arbitrability. *AT & T*, 475 U.S. at 650; *see also John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964).

Under the CBA, arbitration is precluded with respect to "questions of management and matters retained by the employer" in the management rights clause but is permitted "as to any other questions." (App.. 2a.) The management rights clause states, in relevant part,

> Subject only to any limitations contained in this Agreement, the union recognizes and agrees that the Employer retains the exclusive right to . . . discharge . . . and discipline its employees.

(App. 3a.) The management rights clause, which clearly establishes that the rights of management are subject to *any* of limitation found elsewhere in the CBA, is much less sweeping than the management rights clause that this Court interpreted in the benchmark case of *United Steelworkers of America v. Warrior & Gulf Navigator Co.*, 363 U.S. 574 (1960).

In *Warrior & Gulf*, a case where the union challenged the asserted right of the employer to subcontract maintenance work, the management rights clause stated simply that "matters which are strictly a function of management shall not be subject to arbitration under this section." *Id.*, at 576. This Court took note of the fact that, under the applicable CBA, any "differences" that arose, or "any local trouble of any kind", would properly implicate the grievance procedure. Although the language of the CBA broadly exempted from arbitration "matters which are strictly a function of management", this Court nonetheless found that the employer's decision on subcontracting constituted a dispute over the meaning and application of contract language that the parties had agreed to submit to an arbitrator. *Id.*, at 585.

The language contained in the CBA in this case makes a more compelling case for arbitration than the language that this Court confronted in *Warrior & Gulf*. The arbitration clause in Article II, Section 5 of the CBA precludes arbitration only if the specific management right to which the union's grievance is addressed is unaffected by "*any* limitations contained in the Agreement." (Emphasis added.) The prefatory language in the management rights clause of Article II, Section 5 makes it clear that management's rights may be circumscribed by *any* limitations set out anywhere in the CBA, not just by those which are express or explicit. In searching the CBA for limitations on the right to discharge, it is entirely natural and consistent with recognized labor law principles to focus on the seniority rights clause, which contains an express "cause" limitation on the right of UDWI to break and not restore a discharged employee's seniority.

The Seventh Circuit acknowledged that this Court's jurisprudence on labor arbitration requires that arbitration be compelled whenever an arbitration clause is

merely "susceptible of an interpretation that covers the asserted dispute" and that federal courts resolve any doubts as to arbitrability in favor of coverage. The Seventh Circuit further noted, quoting from its decision in *Logistics Support Group*, 999 F.2d 227, 230, that "the management rights clause may not be considered apart from the rest of the agreement." (App. 5a.) Nonetheless, the Seventh Circuit upheld the decision of the District Court because the terms of the management rights clause in the CBA "so clearly state that [UDWI] possesses plenary authority over discharge decisions". (App. 6a.)

Contrary to the Seventh Circuit's conclusions, however, the management rights clause does not give the employer "plenary authority over discharge decisions" but, rather, explicitly states that the right to discharge may be circumscribed by *any* limitations set out anywhere in the CBA. The seniority provision, Article V, Section 4 contains such limitations. If nothing else, whether the express limitation on the right to break and terminate an employee's seniority is also a limitation on the right to discharge, as recognized by this Court, is *in itself* a quintessential contract interpretation question best left to an arbitrator, *Wright, supra.*

Given the conflict in the Circuits as well as the Seventh Circuit's failure to follow long-standing precedent, Local 1393 respectfully submits that this Court should accept this case for hearing and compel arbitration of the discharge grievance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 7, 1999

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 98-2388

LOCAL UNION 1393 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Plaintiff-Appellant,

v.

UTILITIES DISTRICT OF WESTERN INDIANA RURAL ELECTRIC MEMBERSHIP COOPERATIVE,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division
No. 97 C 1375—Larry J. McKinney, *Judge*

ARGUED DECEMBER 8, 1998
DECIDED FEBRUARY 12, 1999

Before COFFEY, RIPPLE and MANION, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Local 1393 ("the Union") brought this action to compel the Utilities District of Western Indiana ("Utilities District") to arbitrate a grievance. The district court dismissed the claim on the Utility District's summary judgment motion. For the reasons set

forth in the following opinion, we affirm the judgment of the district court.

I

BACKGROUND

A.

The Utilities District discharged Dennis Bays for failure to appear at work at the proper time. The Union, acting pursuant to a collective bargaining agreement ("CBA"), then filed a grievance on Bays' behalf. The grievance sought back pay and reinstatement on the ground that the discharge was not for cause.

Article III, Section 1 of the CBA contains a broad grievance clause. It states:

> Any difference arising between an employee or a group of employees within the bargaining unit as to [the Utility District's] interpretation or application of this Agreement or any of its terms and conditions may constitute a grievance.

R. 1, Ex.A. This grievance clause further requires that, once the Union files a grievance, the concerned employee, the Union steward and the supervisor discuss the issue. If the grievance is not settled within seventy-two hours of that discussion, the grievance must be reduced to writing and submitted to the Utility District's Manager. In its discussion of this stage of the procedure, the grievance clause provides that "[a] decision by the Cooperative's Manager shall be final upon questions of management and matters retained by the employer as provided in [Section] 5 of Article II." *Id.* The grievance clause further states that, "as to any other questions," the Union may demand arbitration of its grievance. *Id.*

The clause referenced by the grievance clause, Article II, Section 5, is the management rights clause. That clause states:

> Subject only to any limitations contained in this Agreement, the union recognizes and agrees that the Employer retains the exclusive rights to . . . discharge . . . and discipline its employees.

Id.

In the final CBA provision relevant here, Article V, Section 4 delineates the conditions under which the District may terminate an employee's seniority. One of the conditions is when an employee "[i]s discharged for cause." *Id.*

B.

Before the district court, the Union argued that Bays' grievance should be submitted to arbitration. Pointing to the broad grievance provision and to Article V's requirement that the Utilities District must have "just cause" to break an employee's seniority, the Union claimed that the Utilities District also must have "just cause" to terminate employment.

The district court rejected the Union's argument. It found controlling the language of the management rights clause that "the Employer retains the exclusive rights to . . . discharge . . . and discipline." The court took the view that this express language of the management rights clause cannot be contradicted by the general and broad language of the arbitration clause. Nor did the court believe that the seniority provision of Article V could be read as limiting the employer's right to terminate employment under the management rights clause. "The right to discharge," wrote the court, "and the right to end an employee's seniority are two different rights. Seniority refers to the continuous service of an employee and is a

factor the employer takes into account when making employment decisions. . . . [S]eniority is not coterminous with employment." Mem. Op. at 7-8.

In short, the district court concluded that the terms of the collective bargaining agreement gave the employer the exclusive right to discharge its employees. The grievance and arbitration provisions of the CBA specifically exempt management's decision to discharge from the requirement of arbitration. The provision governing the termination of an employee's seniority rights does not give that employee the right to have his discharge grievance arbitrated.

II

DISCUSSION

The district court appropriately chose as the starting point of its analysis several cardinal principles emphasized by the Supreme Court of the United States in its recent jurisprudence on arbitration. We shall start our own discussion from the same perspective. " '[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute that he has not agreed to submit.' " *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)). Whether a particular collective bargaining agreement creates a duty to arbitrate is a matter for judicial determination. *See id.* at 649. Finally, when the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that " '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.' " *Id.* at 650 (quoting

United Steelworkers, 363 U.S. at 582-83). With these general principles in mind, we turn to the particular CBA before us. As the principles stated by the Supreme Court in *AT&T Technologies* make clear, it is the text of that document that must control.

At the outset, we agree with the Union that the grievance clause in the CBA is very broad. Nevertheless, the scope of that broad grievance clause is expressly limited by the provision in that clause that "[a] decision by the Cooperative's Manager shall be *final* upon questions of management and matters retained by the employer as provided in [Section] 5 of Article II." Article III, Section 1 (emphasis added). Article II, Section 5, the management rights clause, in turn provides that, "[s]ubject only to any limitations contained in this Agreement, . . . the Employer retains the *exclusive* rights to . . . discharge . . . and discipline." (emphasis added).

The Union nevertheless submits that the seniority termination clause provides, explicitly or implicitly, an independent limit on the right of the District to terminate employment. In evaluating this contention, we start with the premises that "the management rights clause may not be considered apart from the rest of the agreement" and that there may be implied terms that give the management rights provision a scope narrower than, at first reading, its terms may suggest. *International Bhd. of Teamsters v. Logistics Support Group*, 999 F.2d 227, 230 (7th Cir. 1993). We also have noted, however, that an implied restriction of the management rights clause must be grounded in a provision of the CBA that is "expressly addressed to the dispute the union seeks to arbitrate." *Id.*; *see also International Ass'n of Machinists & Aerospace Workers v. General Elec. Co.*, 865 F.2d 902, 906 (7th Cir. 1989). In short,

> if the parties have agreed that management has the authority to conduct certain aspects of its business free from any union interference, a conflict arising in this domain is arbitrable only if management is alleged to have violated some specific check on its discretion.

Logistics Support Group, 999 F.2d at 230.

We do not believe that the seniority rights clause can be considered an express limitation on the right of the employer to terminate employees. A termination of employment does not necessarily also terminate seniority and therefore violate the seniority rights clause of the CBA. The right to seniority and the right to continued employment are distinct concepts that the parties to a CBA may choose to treat separately.

Nor, in the context of this collective bargaining agreement, do we believe that a "just cause" limitation on management's right to discharge can be implied. We have suggested that there may be cases in which it would be appropriate to imply a "just cause" limitation on a management rights clause. *Logistics Support Group*, 999 F.2d at 230.[1] Such an implication would be without foundation in this case, however, because the terms of the management rights clause so clearly state that the Utility District possesses plenary authority over discharge decisions. Here, there is an express clause reserving to management the decision to terminate and another clause precluding arbitration of claims related to termination. In *Logistics Support Group*, we held that an employer could refuse to

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[1] Arbitrators have implied a "just cause" requirement for termination from a "just cause" for loss of seniority provision. *See, e.g., SFIC Properties, Inc. v. International Ass'n of Machinists & Aerospace Workers, Dist. Lodge 94*, 103 F.3d 923, 925 (9th Cir. 1996).

arbitrate an unjust termination claim becaues the CBA contained a term expressly reserving for the employer the right to terminate and another term indicating that arbitration was not required unless there was an express term in the CBA indicating that arbitration was appropriate. *See id.* at 230. Although noting that we had held that the existence of an arbitration clause generally implies the existence of a "just cause" provision, we were unwilling to imply a "just cause" requirement in that case because of the explicit management rights provision that reserved to management the right to discharge. *See id.* at 229-30.

Similarly, in this case, we cannot discern any basis to imply a "good cause" limitation on the right of management to discharge. The CBA expressly provides the employer with the sole discretion and final authority to terminate; it also provides that this authority is "[s]ubject only to any limitations contained in this Agreement." Those provisions make clear that a "just cause" requirement should not be implied and the employer's decision to terminate should be given final effect.

Therefore, although we accept as a starting point that the presence of an arbitration clause creates a presumption of arbitrability, the provisions of this CBA simply are not susceptible to the interpretation that the Utilities District is required to arbitrate discharge grievances. Here we have "an absolutely undeniable reservation of unfettered managerial authority." *Logistics Support Group*, 999 F.2d at 230. Because the meaning of the CBA is clear, there is no doubt to resolve in favor of arbitrability. Therefore, the presumption is inapplicable. Accordingly, we hold that the plain wording of the CBA reserves to management the right to terminate employment without resort to arbitration.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

A true Copy:

Test:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. IP 97-1375 C M/S

LOCAL UNION NO. 1393, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Plaintiff,

v.

UTILITIES DISTRICT OF WESTERN INDIANA RURAL ELECTRIC MEMBERSHIP COOPERATIVE,
Defendant.

ORDER

Both plaintiff Local Union No. 1393, International Brotherhood of Electrical Workers, AFL-CIO ("IBEW") and defendant Utilities District of Western Indiana Rural Electric Membership Cooperative ("UDWI") have filed motions for summary judgment against the respective opposing party. IBEW filed their complaint pursuant to § 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a). IBEW alleges that UDWI breached the Collective Bargaining Agreement ("CBA") between the two parties by refusing to arbitrate whether an employee was discharged for cause. At issue is whether that employee's grievance should be submitted to arbitration under the governing CBA. Additionally, IBEW has requested an award of attorney's fees. The issues have been fully briefed by counsel and are ready to be resolved.

For the reasons stated herein, the Court GRANTS UDWI's motion for summary judgment and DENIES IBEW's motion for summary judgment.

I. FACTUAL & PROCEDURAL BACKGROUND

The parties are in agreement as to the underlying facts of the dispute. IBEW and UDWI are parties to a CBA dated July of 1994, which governs the terms and conditions of employment for UDWI's production, maintenance and construction employees. Stallons Aff. ¶ 1; Ex. A ("CBA"). The CBA was in effect in July of 1997 when UDWI discharged Dennis Bays ("Bays"), a bargaining unit employee. IBEW filed a grievance on Bays' behalf seeking reinstatement and back pay. Stallons Aff. Ex. C. In a letter dated August 12, 1997, UDWI stated that Bays was terminated "due to his failure to work at the times mutually identified by himself and management," and refused to agree to submit the grievance to arbitration. *Id.* Ex. D.

Article III of the CBA provides for a grievance and arbitration procedure. Section one of that Article reads "[a]ny differences arising between an employee or a group of employees within the bargaining unit as to the cooperative's interpretation or application of this Agreement or any of its terms or conditions may constitute a grievance if the following procedure is timely instituted and complied with by the Union: . . ." CBA Art. III, § 1. The first step in the process involves the concerned employees, the Union steward, and the supervisor discussing the grievance. *Id.* If the grievance is not settled within seventy-two hours of that meeting, then the second step in the procedure is to reduce the grievance to writing and submit it to the Cooperative's Manager within fifteen days from the alleged grievance. When a grievance is not re-

solved within twenty days of it being reduced to writing, the grievance may proceed to the third step of the process, which allows the Business Manager of the Union to demand arbitration. However, not all grieavnces may advance to arbitration. According to the CBA, at the second step of the procedure "[a] decision by the Cooperative's Manager shall be final upon questions of management and matters retained by the employer as provided in 5 of Article II." *Id.* Section five of Article II, which is referenced in step two of the grievance procedure, reads:

> Subject only to any limitations contained in this Agreement, the Union recognizes and agrees that the Employer retains exclusive rights to hire, discharge, layoff, promote, demote and discipline its employees; to assign tasks, places and times of work; to determine the methods and means by which its operations are to be carried on; to direct the performance of work and to provide for the conduct of the operations in a safe and effective manner.

Id. Art. II, § 5.

The description of the third step of the procedure, which immediately follows the sentence regarding the Cooperative Manager's final determination on questions of management and matters retained in Article II, section five, begins, "However, as to any other questions involved in the grievance upon which such decision shall have been rendered as above provided, the Business Manager of the Union may demand arbitration . . . ." *Id.* Art. III, § 1. The CBA also provides that, "[t]he arbitrator shall have no power to render a decision which adds to, subtracts from or modifies this Agreement; and the arbitrator's decision shall be confined to the meaning of the contract provision which gave rise to or which relates to the dispute." *Id.* Art III, § 4. Additionally, Article V of the

CBA outlines the rules governing employee seniority. Seniority "refer[s] to and include[s] the total length of continuous service of an employee with the Employer." Art. V, § 1. Service by an employee "shall be considered broken and seniority rights shall not be restored to a regular employee who: (1) voluntarily terminates his employment; (2) Is discharged for cause . . . ." *Id.* Art. V, § 4.

II. STANDARDS

According to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A genuine issue of material fact exists whenever "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The nonmoving party bears the burden of demonstrating that such a genuine issue of material fact exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Oliver v. Oshkosh Truck Corp.*, 93 F.3d 992, 997 (7th Cir. 1996). The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. *Anderson*, 477 U.S. at 248; *JPM Inc. v. John Deere Indus. Equip. Co.*, 94 F.3d 270, 273 (7th Cir. 1996). Guided by these standards, this Court now considers the present motion for summary judgment.

III. DISCUSSION

A. Summary of Arguments

The IBEW maintains that Bays' grievance should be submitted to an arbitrator. It contends that the CBA provision which explains that an employee's seniority may be terminated when the employee is discharged for cause means that UDWI's authority to terminate its employees, and thus terminate their seniority, is restricted. As such, it reasons, Bays's discharge is "clearly arbitrable under Article II of the CBA and controlling legal precedents" or at least meets the minimal requirement that the CBA be susceptible of an interpretation that the parties intended the arbitration clause to encompass employee discharges. Plf.'s Mot. for Summ. J. at 4; Plf.'s Resp. to Def.'s Mot. for Summ. J. at 3-4. IBEW also maintains that because there are express limitations on UDWI's ability to discharge employees, the Court does not have to analyze whether the CBA contains implied restrictions on UDWI's ability to terminate employment. Additionally, IBEW has requested that the Court award attorney's fees because UDWI's refusal to arbitrate was frivolous and unreasonable.

In contrast, UDWI maintains that under the express provisions of the CBA, the Cooperative's Manager has the final decision as to grievances concerning employee discharges. Furthermore, it argues that because seniority is not coterminous with employment, Article V of the CBA does not require that employee discharges be arbitrated. UDWI also asserts that a just cause provision should not be implied because had the parties wanted to restrict UDWI's right to discharge, it could have done so, and an implied provision would be at odds with express provisions of the CBA.

B. Analysis

The Seventh Circuit has had the opportunity to address arbitration disputes and has reaffirmed general principals provided by the Supreme Court in arbitration cases. *See Local 371 v. Logistics Support Group*, 999 F.2d 227, 228 (7th Cir. 1993); *International Ass'n of Machinists, Lodge No. 1000 v. General Electric Co.*, 865 F.2d 902, 903-04 (7th Cir. 1989). First, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 634, 648 (1986) (quoting *United States Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). Second, the issue of whether the CBA creates a duty to arbitrate is a matter for judicial determination. *Id.* at 649. Third, when the CBA does contain an arbitration clause, the courts have imposed a presumption in favor of arbitration to the extent that "[a]n order to arbitrate should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* at 650 (quoting *Warrior & Gulf*, 363 U.S. at 582-83.)

Generally, a grievance and arbitration procedure is considered the union's compensation for agreeing not to strike. *General Electric*, 865 F.2d at 903. However, despite the fact that case law suggest that there is "a supposed public policy in favor of labor . . . arbitration," the Seventh Circuit has emphasized that "arbitration is a creature of contract." *Id.* at 904. The *Logistics* court also acknowledged that generally reciprocity demands that if there are few exceptions to the "no strike" clause, there should be few exceptions read into the grievance procedure, but the court went on to explain that the duty to arbitrate is ultimately prescribed by contract. 999 F.2d at 231. Col-

lective bargaining agreements do not have to contain an arbitration clause. *General Electric*, 865 F.2d at 904. For those agreements that do contain an arbitration clause, the scope of that clause is governed by the terms the parties negotiated in the agreement. *Id.* Accordingly, "[a]n employer, therefore, is not required to arbitrate a grievance that is not within the scope of the arbitration clause." *Id.* However, in *Logistics*, the court noted that the agreements should be specific as to which subjects are to be excluded from arbitration. 999 F.2d at 231. The court concluded "[w]e would not be going too far in saying that a finding of nonarbitrability requires an absolutely undeniable reservation of unfettered managerial authority." *Id.*

A "just cause" provision may be implied into arbitration agreements. The Seventh Circuit has held that the existence of an arbitration clause implies the existence of a just cause provision on "the theory that the very nature of labor arbitration suggests that arbitrators have the power to order the reinstatement of employees who were fired without cause." *Logistics Support Group*, 999 F.2d at 229. However, an implied provision, such as just cause, "must give way to express provisions in the parties' agreement." *Id.* at 229 (citing E. Allan Farnsworth, *Farnsworth on Contracts* § 7.16 (1990)). Both parties believe that the CBA is clear as to what areas are covered by the CBA, and neither party has requested that the Court read a just cause provision into the CBA.[1]

IBEW is correct in stating that the grievance and arbitration provision contained in this CBA differs from the CBA at issue in *Logistics*. The court emphasized that the

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[1] The Court notes that the CBA's express provisions control which decisions are subject to arbitration, and the Court does not have to determine whether a just cause provision should be implied.

arbitration provision in *Logistics* was quite narrow. In contrast, the arbitration clause in this CBA is quite broad. However, broadness of the arbitration clause does not negate the fact that Article II, section five of the CBA does expressly exempt certain activities from arbitration. The Court cannot order UDWI to arbitrate a dispute it has not agreed to submit to arbitration. Article II, section five does include the language "subject only to other limitations contained in this Agreement" before it lists those decisions which are excluded from arbitration. IBEW maintains that the seniority provisions of Article V are those other limitations and that the provision which limits the conditions under which seniority may be terminated limits UDWI's ability to terminate a worker's employment without cause. IBEW argues that Article V allows the issue of discharge to be arbitrated because the issue of whether Bays seniority was was properly terminated may be arbitrated.

The seniority provision of Article V does not limit the employer's rights under Article II, section five. The right to discharge and the right to end an employee's seniority are two different rights. Seniority refers to the continuous service of an employee and is a factor the employer takes into account when making employment decisions. As UDWI correctly pointed out, seniority is not coterminous with employment, as there are situations where an employee may not be working for UDWI, but under the CBA, may not lose seniority. IBEW and Bays have not put his senaiority at issue. Bays' grievance alleges unjust discharge. He did not file a grievance claiming his seniority was not properly taken into account in the decision to discharge him or that his seniority was wrongly terminated. If Bays later had a reason to question whether this discharge broke his service to UDWI, thus affecting his seniority rights, that issue may be subject to the arbi-

tration procedure. However, that is not the issue in this case. The provision which limits under what circumstances seniority rights may be terminated does not limit the employer's right to discharge employees, nor does it require that employee discharges be subject to arbitration.

The last sentence of the second step of the grievance procedure does give a specific limit to the ability to arbitrate a grievance. The CBA specifies that the Cooperative's Manager has the final decision on any right listed in Article II, section five, and grievances concerning any of those areas do not have the right to continue on to arbitration. Article II, section five gives a list, be it a broad one, of the areas for which the employer retains exclusive rights and the Cooperative's Manager has the final decision. When the parties signed the CBA, they agreed to the broad grievance clause and the broad list of exclusions to the arbitration clause. They agreed that the right to arbitrate would be limited in accordance with Article II, section five. The sentence "subject only to any limitations contained in this Agreement" does not make the list any less specific if other provisions of the agreement do not limit the employer's right.

The CBA, which had been renewed after its original term and in effect for over two years at the time of the Bays' discharge, gave the employer the exclusive right to discharge employees. The arbitration and grievance procedure specifically exempted that right from having to be subject to arbitration. The provision that provides under what circumstances an employee's seniority rights may be terminated does not limit the employer's right to discharge employees. The CBA is not subject to an interpretation in which the discharge grievance would be subjected to arbitration. The right an employee has to have his seniority grievance arbitrated does not give him the right to

have his discharge grievance arbitrated. The rules governing the granting of seniority do not govern the discharging of employees.

III. CONCLUSION

According to the CBA, UDWI has reserved exclusive rights as to the issue of employee discharge and the agreement specifies that the Cooperative's Manager has the final decision on such issues. The seniority provision does not limit this right. The Court will not compel arbitration of the discharge grievance. Therefore the motion for summary judgment in favor of UDWI and against IBEW should be GRANTED. IBEW's motion for summary judgment against UDWI should be DENIED. As such, IBEW's request for attorney's fees is DENIED. No triable issues remain and UDWI is granted judgment as a matter of law.

IT IS SO ORDERED this 19th day of May 1998.

/s/ Larry J. McKinney
LARRY J. MCKINNEY, JUDGE
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. IP 97-1375 C M/S

LOCAL UNION NO. 1393, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Plaintiff,

v.

UTILITIES DISTRICT OF WESTERN INDIANA RURAL ELECTRIC MEMBERSHIP COOPERATIVE,
Defendant.

ENTRY OF JUDGMENT

The Court has granted a motion for summary judgment in favor of the defendant, UTILITIES DISTRICT OF WESTERN INDIANA RURAL ELECTRIC MEMBERSHIP COOPERATIVE, and against the plaintiff, LOCAL UNION NO. 1393, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO. A final judgment is entered accordingly. Plaintiff shall take nothing by way of his complaint. This cause is DISMISSED WITH PREJUDICE.

Dated this 19th day of May, 1998.

/s/ Laura Briggs
LAURA BRIGGS, Acting Clerk
United States District Court
Southern District of Indiana

By: /s/ Diana L. Dickerson
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

March 10, 1999

Before

HON. JOHN L. COFFEY, Circuit Judge
HON. KENNETH F. RIPPLE, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge

No. 98-2388

LOCAL UNION 1393 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Plaintiff-Appellant,

v.

UTILITIES DISTRICT OF WESTERN INDIANA RURAL ELECTRIC MEMBERSHIP COOPERATIVE,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. 97 C 1375—Larry J. McKinney, Judge

ORDER

On consideration of the appellant's petition for rehearing filed on February 24, 1999, the judges on the panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

STATUTORY PROVISIONS INVOLVED

Section 203(d) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 173(d), provides as follows:

> **Use of conciliation and mediation services as last resort**
>
> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievances disputes arising over the application or interpretation of an existing collective bargaining agreement. The Service is direceed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

Section 301(a) of the LMRA, 29 U.S.C. § 185(a), provides as follows:

> **Venue, amount, citizenship**
>
> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy or without regard to the citizenship of the parties.

FILED
JUL 6 1999
OFFICE OF THE CLERK

(2)

No. 98-1954

IN THE

Supreme Court of the United States

LOCAL UNION 1393, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

v.

UTILITIES DISTRICT OF WESTERN INDIANA RURAL ELECTRIC MEMBERSHIP COOPERATIVE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a discharge grievance is subject to arbitration under a collective bargaining agreement containing a grievance and arbitration clause which expressly excludes from arbitration grievances over management's decision to discipline or discharge employees, subject only to any limitations in the agreement, and containing a "cause" limitation on the employer's right to terminate seniority, but no similar language concerning the employer's right to terminate employment.

STATEMENT PURSUANT TO RULE 29.6 OF THE SUPREME COURT OF THE UNITED STATES

Respondent, Utilities District of Western Indiana Rural Electric Membership Cooperative, is a non-stock, Indiana rural electric membership corporation, owned by its members. There is no parent or publicly held company owning 10% or more of the Respondent corporation.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings in the United States Court of Appeals for the Seventh Circuit, with the exception of amici curiae, appear in the caption to this Petition.

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Rule:

United States Supreme Court Rule 10 1

Utilities District of Western Indiana Rural Electric Membership Cooperative respectfully submits its Brief in Opposition to Petition for Writ of Certiorari filed by Local Union 1393, International Brotherhood of Electrical Workers, AFL-CIO and requests the Court to deny review of the decision of the United States Court of Appeals for the Seventh Circuit entered herein on February 12, 1999.

CITATIONS TO OPINION BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is officially reported at 167 F.3d 1181 (7th Cir. 1999) and appears in the Appendix to the Petition for Writ of Certiorari at pages Pet. App. 1a-8a.[1] The decision of the United States District Court for the Southern District of Indiana is not published in either an official or unofficial reporter. It appears in the Appendix to the Petition for Writ of Certiorari at pages Pet. App. 9a-19a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the District Court judgment was entered on February 12, 1999. The jurisdiction of this Court was invoked by Petitioner under 29 U.S.C. § 1254(1). The considerations governing this Court's jurisdiction on a writ of certiorari are enumerated in Rule 10 of the Rules of the Supreme Court of the United States. That rule states, in relevant part, "A petition for a writ of certiorari will be granted only for compelling reasons." Inasmuch as the Seventh Circuit Court of Appeals correctly construed the

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1. References to the Appendix to the Petition for Writ of Certiorari will be as follows: "Pet. App. __."

collective bargaining agreement at issue consistent with this Court's precedent and not in conflict with decisions in other circuits, there are no compelling reasons to grant the petition, and it should be denied.

STATEMENT OF THE CASE

A. The Facts and the Jurisdiction of the District Court.

The jurisdiction of the District Court was invoked under 29 U.S.C. § 185(a) (jurisdiction over disputes arising under collective bargaining agreements). In the District Court, Petitioner, Local Union No. 1393, International Brotherhood of Electrical Workers, AFL-CIO ("Local 1393") filed a complaint against the Respondent, Utilities District of Western Indiana Rural Electric Membership Cooperative ("UDWI"), to compel arbitration under a collective bargaining agreement of a grievance over UDWI's discharge of a bargaining unit employee. (Pet. App. 9a.)

Local 1393 and UDWI are parties to a collective bargaining agreement ("CBA") effective July 1, 1994, governing the terms and conditions of employment of UDWI's production, maintenance, and construction employees. (Pet. App. 10a.)

Article III of the CBA provides for a grievance and arbitration procedure. Section one of that Article reads:

> [a]ny differences arising between an employee or a group of employees within the bargaining unit as to the cooperative's interpretation or application of this Agreement or any of its terms or conditions may constitute a grievance if the

> following procedure is timely instituted and complied with by the Union: . . . .

(Pet. App. 10a.) The first step in the process involves the concerned employees, the Union Steward, and the supervisor discussing the grievance. (Pet. App. 10a.) If the grievance is not settled within seventy-two hours of that meeting, the second procedural step is to reduce the grievance to writing and submit it to the Cooperative's Manager within fifteen days from the alleged grievance. (Pet. App. 10a.) When a grievance is not resolved within twenty days of being reduced to writing, the grievance may proceed to the third step, which allows the Business Manager of the Union to demand arbitration. (Pet. App. 10a-11a.) However, according to the CBA, at the second step, "[a] decision by the Cooperative's Manager shall be final upon questions of management and matters retained by the employer as provided in 5 of Article II" and should, therefore, not be subject to arbitration. (Pet. App. 11a.) The third step of the procedure begins, "[h]owever, as to any other questions involved in the grievance upon which such decision shall have been rendered as above provided, the Business Manager of the Union may demand arbitration. . . ." (Pet. App. 11a-12a.)

Section five of Article II of the CBA is a management rights clause, which is referenced in step two of the grievance procedure, and provides:

> Subject only to any limitations contained in this Agreement, the Union recognizes and agrees that the Employer retains exclusive rights to hire, discharge, layoff, promote, demote and discipline its employees; to assign tasks, places

> and times of work; to determine the methods and means by which its operations are to be carried on; to direct the performance of work and to provide for the conduct of the operations in a safe and effective manner.

(Pet. App. 11a.)

Article V of the CBA then outlines the rules governing employee seniority and states that seniority "refer[s] to and include[s] the total length of continuous service of an employee with the Employer." (Pet. App. 11a-12a.) Section four of Article V provides, in relevant part, that service by an employee "shall be considered broken and seniority rights shall not be restored to a regular employee who: (1) voluntarily terminates his employment; (2) is discharged for cause. . . ." (Pet. App. 12a.)

B. Proceedings Below.

On January 28, 1998, the parties each filed summary judgment motions. UDWI argued that under the agreed provisions of the CBA, the Cooperative's Manager has the final decision upon grievances concerning employee discharge; that an implied "just cause" provision would be at odds with the CBA's express provisions; and that the seniority provisions are not a limitation in this CBA upon UDWI's right to discharge an employee.

On May 19, 1998, the District Court denied Local 1393's motion for summary judgment and granted UDWI's summary judgment motion. The District Court found controlling the language in the management rights clause that "the Employer retains the exclusive rights to . . .

discharge . . . and discipline." The District Court concluded the "arbitration and grievance procedure specifically exempted [the right to discharge] from having to be subject to arbitration." (Pet. App. 17a.) Furthermore, the District Court found the seniority provision of Article V could not be read as limiting the employer's right to discharge under the management rights clause. According to the District Court:

> The right to discharge and the right to end an employee's seniority are two different rights. Seniority refers to the continuous service of an employee and is a factor the employer takes into account when making employment decisions . . . [S]eniority is not coterminous with employment.

(Pet. App. 16a.)

On May 28, 1998, Local 1393 filed its Notice of Appeal to the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit"). On February 12, 1999, the Seventh Circuit affirmed the decision of the District Court. (Pet. App. 1a-2a.)

The Seventh Circuit held that the seniority rights clause cannot be considered an express limitation on the right of the employer to terminate employees because a termination of employment does not necessarily also terminate seniority and, therefore, violate the seniority rights clause of the CBA. (Pet. App. 6a.) The Seventh Circuit further held that "the right to seniority and the right to continued employment are distinct concepts that the parties to a CBA may choose to treat separately." (Pet. App. 6a.)

According to the Seventh Circuit, no "just cause" limitation should be implied because the terms of this management rights clause clearly state that UDWI possesses plenary authority over discharge decisions and the grievance and arbitration clause precludes arbitration of claims related to termination. (Pet. App. 6a-7a.) Based upon these provisions, the Seventh Circuit concluded a "just cause" requirement should not be implied; the employer's decision to terminate should be given final effect; and the presumption in favor of arbitrability is inapplicable because the meaning of this CBA is clear and not susceptible to the interpretation that UDWI is obligated to arbitrate discharge grievances. (Pet. App. 7a.)

On February 24, 1999, Local 1393 filed with the Seventh Circuit a petition for rehearing and suggestion for rehearing *en banc*. On March 10, 1999, the Seventh Circuit denied the petition for rehearing. (Pet. App. 20a-21a.)

REASONS FOR DENYING THE WRIT

The Seventh Circuit's decision is not in conflict with decisions rendered by the Eighth and Ninth Circuits. It also does not create a split in the Circuits concerning the proper interpretation of collective bargaining agreements which contain a "cause" limitation on the employer's right to terminate seniority but no similar limitation on the employer's right to terminate employment. The decisions Local 1393 has cited involved enforcement of arbitrators' awards, not suits to compel arbitration. Notwithstanding the strong federal policy favoring arbitration of labor disputes, arbitration is a matter of contract. Given the terms of this CBA, the Seventh Circuit properly concluded UDWI was not required to arbitrate a dispute it had not agreed to submit to arbitration.

The Seventh Circuit's decision is not contrary to the decisions of this Court favoring arbitration and creating a presumption in favor of arbitrability. The Seventh Circuit properly considered the policy favoring arbitration when it reviewed the provisions of the collective bargaining agreement and found the agreement expressly excluded discharge grievances from arbitration and was, therefore, not susceptible to an interpretation that such grievances were arbitrable. Consequently, the Court should deny the Petition for Writ of Certiorari.

I. THIS COURT SHOULD DENY THE WRIT BECAUSE PETITIONER RELIES ON EIGHTH AND NINTH CIRCUIT DECISIONS WHICH ARE INAPPLICABLE AND THERE IS NO SPLIT IN THE CIRCUITS.

Local 1393 attempts to create conflict where none exists by citing decisions from the Eighth and Ninth Circuits. In doing so, Petitioner urges this Court to decide that termination of seniority under a collective bargaining agreement is concomitant with termination of employment in cases where the issue is whether a discharge grievance is arbitrable. However, the two cited decisions do not support Local 1393's proposition. Both cases involved a suit to enforce an arbitrator's award. They were not suits to compel arbitration. Although related, these two actions are distinguishable. In an action to enforce an arbitrator's decision, the issue before the reviewing court is typically whether the arbitrator exceeded his or her broad range of authority. The issue in this cause, however, is whether the parties to the collective bargaining agreement agreed to submit this particular matter to arbitration.

Arbitrators are given wide deference by the courts once it has been determined the issue is arbitrable, so long as the arbitrator's decision draws its essence from the agreement, *Jasper Cabinet Co. v. United Steelworkers of America, AFL-CIO-CLC, Upholstery and Allied Division*, 77 F.3d 1025, 1028-29 (7th Cir. 1996), but giving an arbitrator broad discretion because of his or her knowledge of industry practices does not mean our courts will disregard the express terms of a collective bargaining contract. *Truck Drivers, Union Local 705 v. Schneider Tank Lines*, 958 F.2d 171, 172-173 (7th Cir. 1992).

Local 1393 cites *SFIC Properties v. International Assn. of Machinists and Aerospace Workers, Dist. Lodge 94*, 103 F.3d 923 (9th Cir. 1996), *cert. denied*, 118 S. Ct. 80 (1997), in which the Ninth Circuit reversed the District Court's decision and upheld an arbitrator's award. Unlike this action, *SFIC Properties* was not a case to compel arbitration. Petitioner erroneously asserts that in *SFIC Properties*, the Ninth Circuit approved of the arbitrator inferring a just cause requirement for discharge. What the Ninth Circuit did was acknowledge this was what the arbitrator did. The Ninth Circuit simply held that the arbitrator's award should not be vacated because the award drew its essence from the collective bargaining agreement. *SFIC Properties*, 103 F.3d at 925.

The Ninth Circuit in *SFIC Properties* stated the law concisely by acknowledging that a reviewing court, in a suit to enforce an arbitration award, is bound under all except the most limited circumstances to defer to the decision of the arbitrator, even if that decision finds the facts and states the law erroneously. *SFIC Properties*, 103 F.3d at 924-925. The Ninth Circuit went on to identify three

exceptions to this general rule of deference: "(1) when the award does not 'draw its essence from the collective bargaining agreement'; (2) when the arbitrator exceeds the scope of the issue submitted; and (3) when an award runs counter to public policy." *SFIC Properties*, 103 F.3d at 925. The Ninth Circuit then upheld the arbitrator's award because it found the award drew its essence from the CBA even though not based on the language in the CBA, but rather, on the arbitrator's understanding of industry practices. *SFIC Properties*, 103 F.3d at 925-926. According to Local 1393, the Ninth Circuit noted that "it is very common . . . to infer just cause requirements from CBA's which are silent on the issue . . ." (Pet. at 9), but what the Ninth Circuit actually said was that "[a]s it is very common for *arbitrators* to infer just cause requirements from CBA's which are silent on the issue, the award in the instant matter drew its essence from the CBA between SFIC and the union." *SFIC Properties*, 103 F.3d at 926 (emphasis added). The Ninth Circuit did not state it is very common or should be common for our courts to infer just cause requirements when asked to decide whether to compel arbitration of a particular discharge dispute.

Although the Ninth Circuit effectively acknowledged the well settled principle from arbitration decisions that a limitation on an employer's right to terminate an employee's seniority is tantamount to a limitation on its right to discharge, such an acknowledgment is inapplicable to the case before this Court. What an arbitrator can do in deciding a dispute and what a court can do in deciding whether a dispute is arbitrable, are two distinctly different issues. An arbitrator's decision will be upheld if it draws its essence from the contract and will not be overturned unless the arbitrator exceeds his or her broad authority to interpret

collective bargaining agreements. *SFIC Properties*, 103 F.3d at 924-925. In contrast, courts which are asked to decide whether a dispute is arbitrable must look to the contract and, if it is unambiguous, enforce its terms. *See Schneider Tank Lines*, 958 F.2d at 172 (in interpreting a labor contract, the court, unlike an arbitrator, is more narrowly bound by the rules of contract interpretation); *Alexander v. City of Evansville*, 120 F.3d 723, 727 (7th Cir. 1992) (where a collective bargaining agreement is unambiguous, the court should not resort to extrinsic evidence to interpret the agreement); *International Bhd. Of Teamsters, Local Union No. 371 v. Logistical Support Group*, 999 F.2d 227, 229 (7th Cir. 1993) (implied terms must give way to express provisions contained in the parties' collective bargaining agreement).

Local 1393 also cites *Excel Corp. v. United Food and Commercial Workers International Union, Local 431*, 102 F.3d 1464 (8th Cir. 1996) to support its position that courts, in interpreting collective bargaining agreements to determine if a dispute is arbitrable, are required to imply a just cause requirement from a seniority provision. Again, the cited case involved a suit to vacate an arbitrator's award, not a suit to compel arbitration. The Eight Circuit upheld the lower court's decision vacating the award because the arbitrator ignored the CBA language and because the award did not draw its essence from the agreement. Local 1393 mischaracterizes the holding when it states that the Eighth Circuit "noted that the arbitrator properly resolved '[t]he only ambiguity . . . in the language of the seniority provision . . . i.e., that "loss of seniority" means termination.' " (Pet. at 11, *citing Excel*, 102 F.3d at 1470) What the Eighth Circuit actually noted was that the ambiguity was found by the arbitrator. The crucial distinction Local 1393 fails to

mention in regard to *Excel* is that the management rights clause contained a requirement that management only discipline or discharge "for cause" and, therefore, there was no question of whether the arbitrator should imply a just cause requirement in the contract. *Excel*, 102 F.3d at 1470. The management rights clause in *Excel* specifically contained a "for cause" requirement in regard to management's right to discharge. The CBA in the present case, however, contains no such express "for cause" language in its management rights clause in regard to management's right to discharge.

The settled expectations of the parties are contained in the agreed terms of the CBA. No ambiguity exists which would allow an inference that the seniority provision implies a just cause requirement for discharge of an employee. The Seventh Circuit simply upheld the integrity of labor agreements because it based its holding on the express terms of the parties' distinct collective bargaining agreement. The Seventh Circuit's decision is consistent with this Court's holding that the presumption in favor of arbitration is not applicable where the arbitration clause is not susceptible of an interpretation that it covers the asserted dispute and no ambiguities exist. *AT & T Technologies Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986).

By its holding, the Seventh Circuit did not create a split in the circuits. Its decision poses no threat to the orderly administration of justice and does not call for resolution by the Court.

II. THE SEVENTH CIRCUIT'S OPINION IS CONSISTENT WITH THIS COURT'S PRECEDENT.

The Court has enunciated three general principles in regard to whether the parties to a collective bargaining agreement have agreed to arbitrate their disputes. First, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which it has not agreed so to submit." *AT & T Technologies Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). Second, whether a collective bargaining agreement creates a duty to arbitrate a particular grievance is an issue for judicial determination. *AT & T Technologies Inc.*, 475 U.S. at 643. Third, there is a presumption in favor of arbitration when a collective bargaining agreement contains an arbitration clause; however, a court should not order arbitration if the arbitration clause is not susceptible of an interpretation that it covers the asserted dispute. *AT & T Technologies Inc.*, 475 U.S. at 650 (quoting *Warrior & Gulf*, 363 U.S. at 582-83).

With these principles in mind, the Seventh Circuit in the present case upheld the District Court's decision to not compel arbitration because this CBA is clear and not susceptible to an interpretation that the arbitration provision covers employee discharge disputes. (Pet. App. 7a.) Although the Seventh Circuit agreed with Local 1393 that the grievance clause of the CBA is very broad, the court also found its scope was expressly limited by the provision in that clause that "[a] decision by the Cooperative's Manager shall be *final* upon questions of management and

matters retained by the employer as provided in [Section] 5 of Article II." (Pet. App. 5a.) The court further supported its decision with the language in Section 5 of Article II — the management rights clause — which provides that "[s]ubject only to any limitations contained in this Agreement . . . the Employer retains the *exclusive* rights to . . . discharge and discipline." (Pet. App. 5a.)

Local 1393 attempts to show this management rights clause is less sweeping than that found in *United Steelworkers of America v. Warrior & Gulf Navigator Co.*, 363 U.S. 574 (1960), but the provision Local 1393 cited indicating, "matters which are strictly a function of management shall not be subject to arbitration under this section" was contained in the grievance procedure of that collective bargaining agreement, not the management rights clause. *Warrior & Gulf*, 363 U.S..at 576. Also, *Warrior & Gulf* would have been decided differently, according to the Court, if the exclusions from arbitration were stated with specificity. *Warrior & Gulf*, 363 U.S. at 584-585. The Court held:

> Here, however, there is no such provision. Nor is there any showing that the parties designed the phrase "strictly a function of management" to encompass any and all forms of contracting out. In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude a claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad.

Warrior & Gulf, 363 U.S. at 584-85.

Unlike *Warrior & Gulf*, the grievance and arbitration clause in this CBA *expressly* excludes those matters found in the management rights clause from arbitration, and the management rights clause specifically provides that, subject only to any limitations contained in the agreement, UDWI retained the exclusive right to discharge and discipline its employees. (Pet. App. 5a.) Since there is no express limitation in the agreement upon UDWI's exclusive right to discharge an employee, this exclusion satisfies the principles the Court enunciated in *Warrior & Gulf* and rebuts the presumption favoring arbitration.

Local 1393 argues that the seniority provision of the CBA is a limitation on the right of UDWI to discharge an employee because "it is entirely natural and consistent with recognized labor law principles" that a seniority rights clause limitation on breaking seniority only for "cause" also limits the right to discharge. (Pet. 16-17.) The Seventh Circuit, while acknowledging the management rights clause should not be considered apart from the remainder of the agreement and that implied terms may give this provision a narrower scope, held that "implied restrictions must be grounded in a provision of the CBA that is expressly addressed to the dispute the union seeks to arbitrate." (Pet. App. 5a-6a.) The CBA in the present case contains no express provisions limiting management's right to discipline or discharge except for "just cause."

The Seventh Circuit held that the seniority rights clause was not an express limitation because the right to seniority and the right to continued employment are distinct concepts that the parties to this CBA chose to treat separately. (Pet. App. 6a.) Further, the court held that the seniority provision could not create an implied "just cause" limitation

because the CBA clearly stated UDWI retained the *exclusive* right to discharge and discipline employees. (Pet. App. 6a.) Local 1393 wants the Court to ignore the plain language of the CBA and find that employment and seniority are one and the same, notwithstanding that the parties addressed each separately. Seniority confers rights during employment, such as the right to overtime or choice of jobs, which are rights distinct from continued employment. Under this CBA, an employee could be terminated and rehired before a twelve month break in service. In that case, assuming the termination was not for cause, the employee would return to work without losing his years of seniority. If on the other hand, the termination was "for cause" and the employee was rehired before a twelve month break in service, the employee would not maintain his years of seniority. In that instance, and only that instance, could the employee seek arbitration if he were rehired, but refused his seniority status, to determine if his discharge was for "just cause".

The Seventh Circuit's interpretation of the CBA is consistent with this Court's long-standing precedent and as such, this Court should decline to hear this case.

CONCLUSION

The Petition for a Writ of Certiorari should be denied, and the Seventh Circuit's opinion should be upheld.

Respectfully submitted,

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